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## [a]1. INTRODUCTION: THE ROCKY ROAD TO ACCESSION

Accession by the European Union to the European Convention on Human Rights (ECHR) has been on and off the political agenda for more than 30 years. First mooted by the European Commission in 1979,<sup>1</sup> efforts to formally integrate the EU into the Convention system were dealt a blow by the Court of Justice of the European Union (CJEU) in 1996. In *Opinion 2/94* it held that accession could not be based on Article 235 TEC (now Article 352 of the Treaty on the functioning of the European Union (TFEU)) because the implications of accession would be of constitutional significance and could thus only be brought about by way of Treaty amendment.<sup>2</sup> Given the lack of a concrete draft treaty, the Court at the time could not be very specific as to the precise constitutional challenges accession would bring. However, one can presume that, much like in *Opinion 2/13*,<sup>3</sup> its own role and its relationship with the European Court of Human Rights (ECtHR) lay at the heart of its concerns.

After a brief hiatus, EU accession became tangible again when an explicit competence was included into the failed Treaty establishing a Constitution for Europe,<sup>4</sup> which also made its way into the Lisbon Treaty and is now found in Article 6(2) of the Treaty on European Union (TEU). According to this provision the EU 'shall accede' to the ECHR. More specifically, Protocol No 8 to the Lisbon Treaty stipulates that the accession agreement 'shall make provision for preserving the specific characteristics of the Union and Union law'. Only a few months after the entry into force of the Lisbon Treaty, Protocol No 14 to the ECHR brought with it the necessary reforms on the part of the Convention system allowing the EU to sign up to the Convention.<sup>5</sup> An informal working group commenced with the preparation of a draft accession agreement in July 2010,<sup>6</sup> which was produced in October 2011.<sup>7</sup> After internal negotiations between the EU member states, full negotiations between the EU and all parties to the ECHR took place from June 2012 onwards. A final accession agreement was published in April 2013 (hereinafter AA-ECHR). This agreement was then submitted to the CJEU, which considered the agreement to be incompatible with the Treaties in *Opinion 2/13*.<sup>8</sup>

The CJEU identified a number of aspects of the AA-ECHR, which would need revision in order for it to be acceptable. The deficits identified concern most of the key provisions concerning the role of the EU before the ECtHR after accession. A critical

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<sup>1</sup> Paul Craig, 'EU accession to the ECHR: Competence, procedure and substance' (2013) 36 *Fordham International Law Journal* 1114.

<sup>2</sup> *Opinion 2/94 Accession to the ECHR* [1996] ECR I-1759, paras 34–35.

<sup>3</sup> *Opinion 2/13 Accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms* ECLI:EU:C:2014:2454.

<sup>4</sup> Article I-9.

<sup>5</sup> Now Article 59(2) ECHR.

<sup>6</sup> Tobias Lock, 'Beyond *Bosphorus*: The European Court of Human Rights' case law on the responsibility of member states of international organisations under the European Convention on Human Rights' (2010) 10 *Human Rights Law Review* 529.

<sup>7</sup> CDDH-UE(2011)16.

<sup>8</sup> *Opinion 2/13* (n 3).

evaluation of these deficits follows in the discussion of the relevant features of the AA-ECHR. The CJEU also identified a number of other deficits, a detailed exploration of which would go beyond the scope of this chapter. Thus they can only be mentioned briefly: the potential use of Protocol 16 to the ECHR by the highest national courts;<sup>9</sup> a lack of respect for Article 53 of the Charter of Fundamental Rights;<sup>10</sup> the lack of protection of the principle of mutual trust between the member states in the Area of Freedom, Security and Justice;<sup>11</sup> and the potential jurisdiction of the ECtHR over the Common Foreign and Security Policy.<sup>12</sup>

## [a]2. WHY ACCESSION?

The preamble of the AA-ECHR states the two main reasons why the EU should sign up to the ECHR.<sup>13</sup> First, accession would enhance the protection of human rights in Europe. Second, it would create a possibility for individuals to submit the EU's acts, measures and omissions to the external control of the ECtHR. The first reason reflects the academic and judicial discussion on possible divergences between the case laws of the two European courts, which are generally seen as an unwelcome development.<sup>14</sup> The second reason is a reaction to the currently limited role of the ECtHR in the supervision of EU action. Given that the member states have transferred powers to the EU, it makes sense to extend the ECtHR's control to acts adopted under those powers.<sup>15</sup> Of course, the ECtHR considers member state action that was prompted by a member state's obligations under EU law to come within its jurisdiction. It famously stated in *Matthews* that:

[quotation]The Convention does not exclude the transfer of competences to international organisations provided that Convention rights continue to be 'secured'. Member States' responsibility therefore continues even after such a transfer.<sup>16</sup>[/quotation]

*Matthews* concerned a human rights violation found in a provision pertaining to EU primary law, that is law that can only be amended by all member states acting together. The ECtHR's stance in *Matthews* was taken further in the *Bosphorus* case where the Court introduced a presumption in favour of the human rights protection existent in the EU, which it deemed to be equivalent to what the Convention requires.<sup>17</sup> The presumption applies where a member state has acted in accordance with its duties

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<sup>9</sup> *ibid*, paras 196–199.

<sup>10</sup> *ibid*, paras 187–190.

<sup>11</sup> *ibid*, paras 191–195.

<sup>12</sup> *ibid*, paras 249–257.

<sup>13</sup> An early discussion of reasons for accession can be found in HC Krüger and J Polakiewicz, 'Proposals for a coherent human rights protection in Europe' (2001) 22 *Human Rights Law Journal* 1, 3–7.

<sup>14</sup> D Spielmann, 'Human rights case law in the Strasbourg and Luxembourg Courts: Conflicts, inconsistencies and complementarities' in P Alston (ed.), *The EU and Human Rights* (Oxford: Oxford University Press 1999) 257, 267; R Lawson, 'Confusion or conflict? Diverging interpretations of the European Convention on Human Rights in Strasbourg and Luxembourg' in R Lawson and M de Blois (eds), *The Dynamics of the Protection of Human Rights in Europe, Essays in Honour of Henry G Schermers*, vol III (Dordrecht: Martinus Nijhoff Publishers 1994) 219; Krüger and Polakiewicz (n 13) 7.

<sup>15</sup> Tobias Lock, 'EU accession to the ECHR: Implications for judicial review in Strasbourg' [2010] *European Law Review* 777, 778.

<sup>16</sup> *Matthews v United Kingdom* app no 24833/94, ECHR 1999-I, para 32.

<sup>17</sup> *Bosphorus v Ireland* app no 45036/98, ECHR 2005-VI, para 155.

under a piece of EU legislation provided that it had no discretion in the implementation of that legislation.<sup>18</sup> It seems as if the Court recognised that it would otherwise exercise control over acts of the Union, which, after all, had not signed up to the ECHR. This presumption can, however, be rebutted where the protection in the concrete case was ‘manifestly deficient’.<sup>19</sup> Finally, the Court held in *Connolly* that in the absence of an implementing act by a member state, it did not have jurisdiction to exercise this indirect review. The Court’s reasoning hinged on Article 1 ECHR, which requires that the alleged violation occurred within the jurisdiction of a party to the ECHR. *Connolly* concerned a staff dispute between the EU and one of its officials so that there was no member state involvement. Both *Connolly* and *Bosphorus* must be considered as exceptions to the broad statement on member state responsibility contained in *Matthews*.<sup>20</sup> There are thus gaps in the indirect supervision exercised by the ECtHR before accession. The accession treaty aims to close these gaps by formally subjecting the EU to the ECtHR’s control.

The prospect of EU accession has already exercised many academic minds.<sup>21</sup> One of the key difficulties faced by the negotiators was the allocation of responsibility between the EU and its member states. The EU is characterised by executive federalism, that is a system in which the member states implement legislative acts adopted at the level of the Union. Federal states that are signatories to the ECHR are responsible for violations of the ECHR caused by their constituent states, as these are not parties to the Convention. In contrast to that situation, the EU’s member states will remain parties to it so that the accession agreement had to find a way of dealing with situations of mixed action, for example, where the authorities of a member state act on the basis of a piece of EU legislation. The key challenge for the drafters was the allocation of responsibility in such cases. As *Opinion 2/13* has shown, the CJEU did not consider that this challenge was met.

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<sup>18</sup> Where the member state has discretion, the presumption cannot apply, cf. *Michaud v France* ECHR 2012, para 103.

<sup>19</sup> *Bosphorus v Ireland* (n 17) paras 155–156.

<sup>20</sup> For a more thorough discussion cf. Lock (n 15).

<sup>21</sup> Constance Grewe, ‘Beitritt der EU zur EMRK und ZP 14: Wirksame Durchsetzung einer gesamteuropäischen Grundrechteverfassung?’ [2012] *Europarecht* 285; Tobias Lock, ‘Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order’ (2011) 48 *Common Market Law Review* 1025; Paul Gragl, *The Accession of the European Union to the European Convention on Human Rights* (Oxford: Hart Publishing 2013); Walter Obwexer, ‘Der Beitritt der EU zur EMRK: Rechtsgrundlagen, Rechtsfragen und Rechtsfolgen’ [2012] *Europarecht* 115; Paul Gragl, ‘A giant leap for European Human Rights? The final agreement on the European Union’s accession to the European Convention on Human Rights’ (2014) 51 *Common Market Law Review* 13; Roberto Barrata, ‘Accession of the EU to the ECHR: The rationale for the ECJ’s prior involvement mechanism’ (2013) 50 *Common Market Law Review* 1305; Giorgio Gaja, ‘EU accession to the ECHR’ in Andrea Biondi, Piet Eeckhout and Stefanie Ripley (eds), *EU Law After Lisbon* (Oxford: Oxford University Press 2012); Olivier de Schutter, ‘L’adhésion de l’Union européenne à la Convention européenne des droits de l’homme: feuille de route de la négociation’ [2010] *Revue Trimestrielle des Droits de l’Homme* 535; Noreen O’Meara, ‘“A more secure Europe of rights?” The European Court of Human Rights, the Court of Justice of the European Union and EU accession to the ECHR’ (2011) 12 *German Law Journal* 1813; Christina Eckes, ‘EU accession to the ECHR: Between autonomy and adaptation’ (2013) 76 *MLR* 254; Tobias Lock, ‘End of an epic? The draft accession agreement on the EU’s accession to the ECHR’ (2012) 31 *Yearbook of European Law* 162; Paul Gragl, ‘Der rechtliche Status der EMRK innerhalb des Unionsrechts –Zu den Auswirkungen auf die Rechtsautonomie der Europäischen Union nach ihrem Beitritt zur EMRK’ (2011) 14 *Zeitschrift für europarechtliche Studien* 409; Steering Committee for Human Rights, *70th meeting* (CDDH(2010)010, 2010); AG Toth, ‘The European Union and human rights: The way forward’ (1997) 34 *Common Market Law Review* 491; S. Winkler, *Der Beitritt der Europäischen Gemeinschaften zur Europäischen Menschenrechtskonvention* (Baden-Baden: Nomos 2000).

Having explained the background to accession and introduced the issue of shared responsibility, this chapter will discuss six aspects of the EU's position before the ECtHR after accession: (1) the problem of autonomy of EU law; (2) the co-respondent mechanism; (3) the prior involvement of the CJEU; (4) the EU's internal rules; (5) inter-party disputes; and (6) an outlook into the future. The deficits identified by the CJEU in *Opinion 2/13* will be considered and critically assessed throughout this chapter.

### [a]3. THE EU BEFORE THE ECtHR: THE PROBLEM OF AUTONOMY

The explanatory report appended to the accession agreement makes it clear that 'the EU should accede to the Convention, as far as possible, on an equal footing with the other High Contracting Parties'.<sup>22</sup> The caveat 'as far as possible' points to the specificities of the EU's legal order, which require certain adjustments to be made.<sup>23</sup> The main issue in this respect is the so-called autonomy of the EU legal order.<sup>24</sup> In the context of international agreements concluded by the EU, autonomy sets certain limits to the transfer of competences by the EU to international bodies, in particular international courts. The following quote from *Opinion 1/91* on the EEA Agreement encapsulates this. This agreement provided for a relatively far-reaching jurisdiction of a newly formed EEA Court:

[quotation][T]he EEA Court will have to rule on the respective competences of the Community and the Member States as regards the matters governed by the provisions of the agreement. It follows that the jurisdiction conferred on the EEA Court ... is likely adversely to affect the allocation of responsibilities defined in the Treaties and, hence, the autonomy of the Community legal order ... Consequently, to confer that jurisdiction on the EEA Court is incompatible with Community law.<sup>25</sup>[/quotation]

For the accession agreement, this means that the ECtHR cannot be given jurisdiction to determine the allocation of competence between the EU and its member states. Decisions on these kinds of questions are within the jurisdictional monopoly of the CJEU. This is particularly relevant because, as mentioned above, after accession both the EU and its member states are parties to the ECHR. Because of the EU's executive federalism it is often difficult to decide which entity, EU or member state, was responsible for a violation of the Convention.

Considering that an allocation of responsibility would have to be made on the basis of the EU Treaties, it was perhaps unsurprising that the autonomy of EU law and the exclusive jurisdiction of the CJEU laid down in Article 344 TFEU were central topics in *Opinion 2/13*. The Court was not convinced that the AA-ECHR satisfied the requirements of the autonomy concept with regard to the co-respondent mechanism and the prior involvement of the CJEU, which will be addressed in turn.

### [a]4. THE CO-RESPONDENT MECHANISM

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<sup>22</sup> Draft Explanatory report to the Agreement on the Accession of the European Union to the Convention for the Protection of Human Rights and Fundamental Freedoms, 47+1(2013)008rev2, para 33.

<sup>23</sup> Cf. Preamble; this is explicitly required by Protocol No 8 to the Lisbon Treaty quoted above.

<sup>24</sup> On the different possible meanings cf. Craig (n 1) 1142–6.

<sup>25</sup> *Opinion 1/91 Agreement on the European Economic Area* [1991] ECR I-6079, paras 34–36.

In order to avoid crossing the red lines marked by the CJEU in *Opinion 1/91*, the drafters included the so-called co-respondent mechanism into the draft agreement.<sup>26</sup> This mechanism allows for a co-respondent to join the proceedings and to be held responsible alongside the initial respondent. After explaining how the drafters intended the co-respondent mechanism to work, it will be explored which parts of it the CJEU considered incompatible with the autonomy of the EU legal order.

#### [b]4.1 Attribution

In order to clarify which party was principally responsible for a violation of the Convention, the drafters deemed it necessary to include a rule of attribution into the final draft of the accession agreement, which can be read as a confirmation of the hitherto applicable case law of the ECtHR. Article 1(4) AA-ECHR states:

[quotation]For the purposes of the Convention ... an act, measure or omission of organs of a member State of the European Union or of persons acting on its behalf shall be attributed to that State, even if such act, measure or omission occurs when the State implements the law of the European Union, including decisions taken under the [TEU] and under the [TFEU].[/quotation]

Thus whenever a member state has acted or failed to act, this conduct is attributable to it, no matter whether the action or omission was prompted by an obligation under EU law or not. Consequently, only where none of the member states was involved in an alleged violation, is the conduct attributable to the EU. This would be cases such as *Connolly*.<sup>27</sup>

However, this does not mean that responsibility rests only with the member state in cases in which it acted under an EU law obligation. Otherwise the aim of subjecting the EU to the external scrutiny by the ECtHR would be defeated. The second sentence of Article 1(4) makes this clear:

[quotation]This shall not preclude the European Union from being responsible as a co-respondent for a violation resulting from such an act, measure or omission ...[/quotation]

The accession agreement thus draws a clear line between the attribution of conduct and responsibility for a violation of the ECHR.

#### [b]4.2 Responsibility

The main innovation in the accession agreement is the co-respondent mechanism. A reformed Article 36(4) ECHR was supposed to read:

[quotation]The European Union or a member State of the European Union may become a co-respondent to proceedings by decision of the Court in the circumstances set out in the Agreement on the Accession of the European Union to

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<sup>26</sup> The idea for a co-respondent mechanism was first voiced in a study by the Council of Europe's Steering Committee for Human Rights on 'Technical and legal issues of a possible EC/EU accession to the European Convention on Human Rights' CDDH(2002)010 Addendum 2.

<sup>27</sup> See *supra*.

the Convention for the Protection of Human Rights and Fundamental Freedoms. A co-respondent is a party to the case. The admissibility of an application shall be assessed without regard to the participation of a co-respondent in the proceedings.[/quotation]

The key sentence here is that the co-respondent shall be a party to the case. This means that it will be bound by the decision of the Court and that, in contrast to a third party intervener, it enjoys the same procedural position as the respondent.<sup>28</sup> Respondent and co-respondent(s) will normally be jointly responsible.<sup>29</sup>

The accession agreement distinguishes two situations in which the co-respondent mechanism is triggered depending on whether the initial application is directed against the EU or against one or more member states. In light of the rule on attribution, most cases will be initially directed against a member state. Where this is so, Article 3(2) AA-ECHR provides that:

[quotation]The European Union may become a co-respondent to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation calls into question the compatibility with the Convention rights at issue of a provision of European Union law, including decisions taken under the TEU and under the TFEU, notably where that violation could have been avoided only by disregarding an obligation under European Union law.[/quotation]

The provision seems to be inspired by the *Bosphorus* scenario, in which the member state found itself in a dilemma: it could either abide by the requirements of EU law, and (potentially) violate the Convention, or it could disregard its obligations under EU law and protect Convention rights. However, as the use of the word 'notably' in the provision makes clear, the co-respondent mechanism is not limited to situations in which the member state had no discretion under EU law. The question for the ECtHR will be whether the allegation appears to call into question the compatibility of the provision of EU law on the basis of which the member state has acted. The hurdle to overcome is not very high and it is suggested that if a party plausibly claims that the provision violates a Convention right, the EU can become a co-respondent.

By contrast, situations in which the member states are capable of becoming co-respondents alongside the EU will probably occur very rarely for two reasons. First, it would be necessary that the action or omission complained of is attributed to the EU and not a member state, which presupposes that there was no member state involvement in the concrete case. In light of the EU's executive federalism this is the exception rather than the rule. Second, it would require that the alleged violation is found in EU primary law, that is the Treaties or other provisions, which have the same legal value. Given that the vast majority of substantive provisions in EU law are found in secondary law, there will not be many cases in which the culprit is found in primary law. Article 3(3) of the Accession Agreement states:

[quotation]Where an application is directed against the European Union, the European Union member States may become co-respondents to the proceedings in respect of an alleged violation notified by the Court if it appears that such allegation

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<sup>28</sup> On the differences to third party intervention cf. Lock (n 15) 785–6.

<sup>29</sup> Article 3(7) AA-ECHR.

calls into question the compatibility with the Convention rights at issue of a provision of the TEU, the TFEU or any other provision having the same legal value pursuant to those instruments, notably where that violation could have been avoided only by disregarding an obligation under those instruments[/quotation]

In addition, Article 3(4) AA-ECHR allows for a change of status from joint respondent to co-respondent if the application is initially directed against both the EU and one or more member states provided that the conditions for the co-respondent mechanism are met.<sup>30</sup>

The decision whether to join proceedings as co-respondent is generally a voluntary decision. Neither the parties nor the ECtHR can force the co-respondent to join. This can lead to an absurd outcome in cases where the EU could potentially be held responsible as co-respondent but decides not to join if the Court then finds a violation that was rooted in EU legislation. Such a result would run counter to the overall aim of accession. For this reason, the EU has indicated that it would make a unilateral declaration that it would request to become co-respondent whenever the conditions laid down in Article 3(2) are met.<sup>31</sup>

#### [b]4.3 Co-respondent Mechanism and *Opinion 2/13*

The co-respondent mechanism was intended as a way of avoiding the trappings of the autonomy of EU law. As explained above, the CJEU does not allow international agreements concluded by the EU to grant jurisdiction to a court to decide on the allocation of competence between the EU and the Member States. The co-respondent mechanism aims to avoid such a finding by allowing the ECtHR to hold both the EU and the Member State concerned jointly responsible.

However, the CJEU identified three flaws in the co-respondent arrangement. The first concerned the procedure for involving a party as co-respondent, which can happen either at the invitation of the Court or at the (prospective) co-respondent's own request:

[quotation]A High Contracting Party shall become a co-respondent either by accepting an invitation from the Court or by decision of the Court upon the request of that High Contracting Party. When inviting a High Contracting Party to become co-respondent, and when deciding upon a request to that effect, the Court shall seek the views of all parties to the proceedings. When deciding upon such a request, the Court shall assess whether, in the light of the reasons given by the High Contracting Party concerned, it is plausible that the conditions in paragraph 2 or paragraph 3 of this article are met.[/quotation]

While the CJEU did not object to the involvement of a co-respondent at the invitation of the Court, it considered the procedure for a request by a potential co-respondent to be incompatible with the autonomy of EU law. It held that in such a case the ECtHR would be empowered to question the plausibility of the reasons for such an involvement, which, according to the CJEU, would require the ECtHR to 'assess the rules of EU law governing the division of powers between the EU and its Member States'.<sup>32</sup> As explained above, this would be a clear violation of the autonomy principle. However, it is perhaps

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<sup>30</sup> On the difference between joint respondents and co-respondents, cf. *infra*.

<sup>31</sup> Cf. Draft Declaration, Appendix II, 47(+1)008rev2.

<sup>32</sup> *Opinion 2/13* (n 3) para 224.



apposite to question the premise of the CJEU's reasoning. A plausibility review does not imply an internally binding assessment of the division of competence between the EU and its member states, so that the standard applied in *Opinion 2/13* must be considered extremely strict. Nonetheless, a re-worked accession agreement would thus have to eliminate this review by the ECtHR and, for example, provide for a right of a potential co-respondent to be included.

The second flaw relates to the legal consequences of a judgment finding that there was a violation of the Convention in a co-respondent case. Article 3(7) AA-ECHR generally provides for a joint responsibility of the Union and the member state concerned. A finding of joint responsibility relieves the ECtHR of the obligation to decide on an exact allocation of responsibility between the EU and its member states, which would be incompatible with the autonomy of EU law.<sup>33</sup> However, Article 3(7) AA-ECHR also foresees an exception to a finding of joint responsibility where respondent and co-respondent give reasons why only one of them should be held responsible and where, having sought the views of the applicant, the ECtHR decides accordingly. The ECtHR found that permitting the ECtHR to make such a finding would again violate the autonomy of EU law.<sup>34</sup> A revised accession agreement would thus have to eliminate this option.

The third flaw is somewhat unrelated to the autonomy of EU law in that the CJEU found fault with a joint responsibility of the EU and its member states in cases where a member state has made a reservation concerning the alleged violation. In the eyes of the Court, this would violate Article 2 of Protocol No 8 to the Lisbon Treaty, which provides that the accession agreement must not affect the situation of the member states in relation to the ECHR. The Court operated under the assumption that there could be cases in which a member state would be held responsible either as a respondent or a co-respondent in cases in which it has made a reservation. Again, this seems to be an over-reaction on part of the CJEU given that under the ECHR it is hard to see how such responsibility should arise. After all, the ECtHR would have to respect the reservation made. In any event, a revised accession agreement would have to explicitly state that no such responsibility existed.

#### [a]5. PRIOR INVOLVEMENT OF THE CJEU

An important consequence of the co-respondent mechanism is that the admissibility of a complaint is assessed without regard to the participation of the co-respondent.<sup>35</sup> This means that the applicant need not show that she has exhausted the domestic remedies available in the legal order of co-respondent,<sup>36</sup> which is the key difference between a co-respondent and joint respondents. In the latter case, the domestic remedies in all the respondents' legal orders must be exhausted in order to be able to bring a case against all of them. The rationale behind the requirement that domestic remedies be exhausted is subsidiarity: the ECtHR should only have to decide cases, which have not been resolved at the domestic level.

The lack of a requirement to exhaust domestic remedies in the co-respondent's legal order can be considered a great advantage for the applicant. However, where the EU is a co-respondent it can lead to the peculiar situation that the CJEU has not had a

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<sup>33</sup> See *supra*.

<sup>34</sup> *Opinion 2/13* (n 3) paras 229–234.

<sup>35</sup> Article 3(1) AA-ECHR.

<sup>36</sup> Required by Article 35(1) ECHR.

chance to make a pronouncement on the compatibility of the EU measure at stake with fundamental rights. This is because in such cases the applicant has to exhaust domestic remedies in the respondent's, that is, the member state's, legal order. The involvement of the CJEU depends on national courts making a reference under Article 267 TFEU. There is a duty on domestic courts to make such a reference, in particular where the court considers an EU measure to be invalid, for example, because it is contrary to fundamental rights.<sup>37</sup> However, the applicant cannot force a reference and the duty to refer does not exist where the domestic court does not consider the measure invalid.<sup>38</sup> Thus it may happen that in co-respondent cases an applicant alleges that an EU measure is incompatible with the ECHR, but for lack of a reference the CJEU has not had an opportunity to examine whether this is true.

### **[b]5.1 The Proposal in the AA-ECHR and the Possible Procedure before the CJEU**

The overall rationale behind the requirement that domestic remedies be exhausted is subsidiarity.<sup>39</sup> For this reason, the then presidents of the two European courts, Costa and Skouris, issued a joint communication calling for a procedure to be 'put in place ... which is flexible and would ensure that the CJEU may carry out an internal review before the ECHR carries out external review'.<sup>40</sup> The drafters took this on board and included the following Article 3(6) into the accession agreement:

[quotation]In proceedings to which the European Union is a co-respondent, if the Court of Justice of the European Union has not yet assessed the compatibility with the Convention rights at issue of the provision of European Union law as under paragraph 2 of this Article, sufficient time shall be afforded for the Court of Justice of the European Union to make such an assessment, and thereafter for the parties to make observations to the Court. The European Union shall ensure that such assessment is made quickly so that the proceedings before the Court are not unduly delayed. The provisions of this paragraph shall not affect the powers of the Court.[/quotation]

The drafters agreed not to introduce a formal reference mechanism between the ECtHR and the CJEU. The only obligation resting on the ECtHR is to grant the CJEU sufficient time to make a decision as to the compatibility of the EU measure at issue with fundamental rights. The ECtHR's decision to give the CJEU the opportunity to make such a pronouncement should be made before the ECtHR enters into a review of the merits of

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<sup>37</sup> Case 314/85 *Foto Frost v Hauptzollamt Lübeck-Ost* [1987] ECR 4199.

<sup>38</sup> *Ibid*, para 14.

<sup>39</sup> Further arguments can be found in Grewe (n 21) 1326–9; Gragl, *The Accession of the European Union to the European Convention on Human Rights* (n 21) 269; a more critical view is espoused by de Schutter (n 21) 563–6; Lock (n 15) 792–3; Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order' (n 21) 1127.

<sup>40</sup> Joint communication from the Presidents of the European Court of Human Rights and the Court of Justice of the European Union, further to the meeting between the two courts in January 2011; this had already been requested by the Court itself, Discussion document of the Court of Justice of the European Union on certain aspects of the accession of the European Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, 5 May 2010, both accessed 17 February 2017 at [www.curia.europa.eu](http://www.curia.europa.eu).

the case.<sup>41</sup> Given the long duration of the procedure before the ECtHR this should hardly ever prove problematic. However, the exact procedure before the CJEU is left open and in the absence of the EU's internal rules remains unclear. The explanatory notes to the accession agreement suggest that the parties involved, including the applicant, would be given the opportunity to make observations before the CJEU. However, it is not clear yet whether there will be oral proceedings, in which configuration the CJEU would sit, whether it would render a formal judgment or a mere opinion. However, the provision places the EU under an obligation to ensure that the CJEU decides quickly. The obvious choice would be the introduction of an accelerated procedure for such cases. In any event, Article 3(6) explicitly states that the CJEU's ruling does not affect the powers of the ECtHR, that is, the ruling cannot be binding on the ECtHR.<sup>42</sup> Even if the CJEU came to the conclusion that there was a violation, the ECtHR would still have a right to find such violation unless, of course, the parties agree to settle the case or to abandon it.

A more fundamental question is whether such a procedure can be introduced into the EU's legal order without Treaty change. Treaty change would be necessary if the introduction of such a procedure were to conflict with the autonomy of the EU legal order. In *Opinion 1/91* the CJEU made it clear that an international agreement concluded by the Union may provide the Union's institutions with new functions. However, Treaty change is necessary where the nature of the institution's functions changes. Several options have been discussed in the literature. One would be to allow the European Commission to instigate proceedings in a procedure akin to Article 263 TFEU.<sup>43</sup> Another possibility would be a procedure based on Article 267 TFEU.<sup>44</sup> A key argument against the necessity of Treaty change can be found in Article 6(2) TEU itself. As the Court of Justice pointed out in its discussion document on accession, it considers the Treaties to require a prior involvement.<sup>45</sup> If Article 6(2) TEU makes EU accession mandatory and if at the same time this can only be achieved if a prior involvement of the CJEU is guaranteed, then Article 6(2) read together with Protocol No 8 to the Lisbon Treaty can be understood as implying a competence for the Union to introduce rules concerning the prior involvement.

## **[b]5.2 The CJEU's Assessment of The Prior Involvement Mechanism in *Opinion 2/13***

While the CJEU confirmed that a prior involvement mechanism was necessary for ensuring the subsidiarity of the control mechanism established by the ECHR,<sup>46</sup> it considered its implementation deficient and incompatible with the Treaties on two grounds.

First, the Court found fault with the process implicit in Article 3(6) AA-ECHR, which allows for a prior involvement only in cases where the CJEU 'has not yet assessed

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<sup>41</sup> Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order' (n 21) 1127.

<sup>42</sup> Draft Explanatory report (n 22) para 68.

<sup>43</sup> For a detailed discussion cf. Lock, 'Walking on a tightrope: The draft ECHR accession agreement and the autonomy of the EU legal order' (n 21) 1049–52.

<sup>44</sup> This option is discussed by Grewe (n 21) 1329–30.

<sup>45</sup> Cf. *Foto Frost* (n 40).

<sup>46</sup> *Opinion 2/13* (n 3) para 236; which is hardly surprising given both the declaration by Presidents Skouris and Costa (referred to above) and the Court's own discussion document on EU accession (accessed 17 February 2017 at [http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention\\_en\\_2010-05-21\\_12-10-16\\_272.pdf](http://curia.europa.eu/jcms/upload/docs/application/pdf/2010-05/convention_en_2010-05-21_12-10-16_272.pdf)).

the compatibility with the Convention rights at issue of the provision of European Union law'. According to the Court, this formulation would entail the possibility for the ECtHR to ask whether such an assessment has in fact taken place, which, in the words of the CJEU, 'would be tantamount to conferring on it the jurisdiction to interpret the case-law of the Court of Justice'. Given that such a conferral of jurisdiction would be in violation of the autonomy of the EU legal order (and the exclusive jurisdiction of the CJEU, which flows from it), the Court requested that this provision be amended. The decision whether such an assessment had taken place could only be made by the competent EU institution and the accession agreement would need to provide for that. In particular, it would also have to be ensured that the EU is fully and systematically informed of any such cases so that the relevant institution can make that assessment.

Second, the Court considered that Article 3(6) AA-ECHR was too narrow by restricting the prior involvement to situations in which the compatibility of a provision of EU law was in question. It demanded that a prior involvement be possible in all cases in which the interpretation of a provision of EU law was at issue. The CJEU reasoned that otherwise the ECtHR would be put in a position in which it had to choose from different (possible) interpretations of EU law, which would again be contrary to the CJEU's exclusive jurisdiction.<sup>47</sup> This argument is somewhat questionable for two reasons: first, it seems to disregard the role of the ECtHR as an international human rights court. It is not its role to interpret domestic law, but to find whether in a given factual scenario the human rights of an applicant have been violated. For this purpose it takes into account domestic legislation, but not as part of the law on the basis of which it decides the case, but as part of the facts. If the CJEU has not given its view on how to interpret a provision of EU law, then the ECtHR will take into account the interpretation given by the national court of the respondent EU member state, which must have interpreted that provision. Hence it is not realistic that the ECtHR will ever be tempted to choose between different interpretations of EU law. Second, the CJEU's demands would lead to a significant extension of the prior involvement mechanism, should it be re-drafted accordingly. It could also yield almost bizarre results, for instance in a case in which the applicant complains of a violation of his Convention rights on the basis of an interpretation of EU law given by a national court. If in such a case the CJEU had not been involved via the preliminary reference procedure but would then be involved via the prior involvement mechanism and came to a different (Convention-compatible) interpretation of that same provision, the question would arise how the ECtHR should react to this. After all, the proceedings in the member state would remain *res judicata* and the applicant would still be a victim for the purposes of the Convention. So one may ask what the purpose of an involvement in such a case should be?

In any event, should the AA-ECHR be redrafted according to the CJEU's demands, the likelihood of a prior involvement of the CJEU in proceedings pending before the ECtHR will increase dramatically given that most cases involve an interpretation of EU law, so that in almost all scenarios in which a preliminary reference has not been made, the CJEU would have to be involved. This has the potential of leading to much closer ties between the two courts and a framework for regular dialogue.

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<sup>47</sup> *ibid*, para 246.

## [a]6. THE GREAT UNKNOWN: THE EU'S INTERNAL RULES

The previous sections have already made reference to the internal rules that the EU needs to adopt in order to make the accession agreement workable. These rules have not yet been published, not even in draft form. As far as the topic of this chapter is concerned, these rules will need to deal with three issues: (1) the prior involvement of the CJEU; (2) the representation of the EU before the ECtHR; (3) the issue of redress.

The first issue is the prior involvement of the CJEU in co-respondent cases, which has already been discussed in the previous section. It would particularly need to be stipulated which institution will instigate it; whether there would be an oral hearing; who would bear the costs of that procedure; what type of decision the CJEU will render; whether in the course of that procedure the CJEU would have the power to declare invalid legislation; whether the Advocate General would be heard; and possibly many more.

Second, the internal rules would have to specify which institution would represent the EU before the ECtHR. The European Commission as the EU's executive seems to be the natural choice. However, member states might object to that given that the Commission may pursue a defence strategy not in line with the member states' wishes. Moreover, the question would have to be decided whether in cases where a Commission representative acts as the EU's agent, the member states have some input in the EU's defence strategy. It would also have to be clarified how and by which institution(s) procedural decisions are made, for example, a decision whether the EU should join as co-respondent in the first place, whether the EU should agree to a friendly settlement and who decides on requests for referrals to the Grand Chamber.

Third, the internal rules would have to stipulate how, in case of a defeat for the respondent and co-respondent, the violation is removed. Where monetary compensation is awarded, the accession agreement provides for joint responsibility as the rule.<sup>48</sup> This means that the applicant cannot choose which party to claim the compensation from but she must seek redress from both. Thus the internal rules would have to provide for a way in which such redress is paid and which percentage each of the parties will have to bear. Where redress is not monetary but normative, the competent authorities (either EU or member state or both) would have to take the necessary measures. The internal rules might even have to provide for an internal mechanism to resolve differences between the EU and the member states in such cases.

## [a]7. THE EU BEFORE THE ECtHR: INTER-PARTY DISPUTES

As is well known the ECtHR not only has jurisdiction over complaints brought by individuals, but also over cases brought by one of its high contracting parties against another under Article 33 ECHR.<sup>49</sup> Although such proceedings occur only rarely, this jurisdiction poses some intricate questions in the context of accession. This is because the ECtHR normally has exclusive jurisdiction over such proceedings according to Article 55 ECHR:

[quotation]The High Contracting Parties agree that, except by special agreement, they will not avail themselves of treaties, conventions or declarations in force

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<sup>48</sup> Article 3(7) AA-ECHR; the provision also stipulates that the Court can hold only one of them responsible on the basis of reasons given by the respondent and the co-respondent.

<sup>49</sup> Currently known as inter-state cases, Article 4 AA-ECHR renames these types of cases inter-party cases.

between them for the purpose of submitting, by way of petition, a dispute arising out of the interpretation or application of this Convention to a means of dispute settlement other than those provided for in this Convention.[/quotation]

At the same time the CJEU also enjoys exclusive jurisdiction according to Article 344 TFEU:

[quotation]Member States undertake not to submit a dispute concerning the interpretation or application of the Treaties to any method of settlement other than those provided for therein.[/quotation]

The member states are thus asked to place disputes between them before the CJEU. The procedure for this is found in Article 259 TFEU. While the wording of Article 344 TFEU seems to limit this jurisdiction to disputes over the EU Treaties, the CJEU has interpreted the provision to extend to all disputes over EU law. Given that the CJEU considers international agreements concluded by the EU to be integral parts of EU law,<sup>50</sup> its exclusive jurisdiction extends to disputes over the provisions of such agreements.<sup>51</sup> Thus after accession, at least in certain cases, the provisions of the ECHR come within the jurisdiction of the CJEU.

## [b]7.1 The Solution in the AA-ECHR

For this reason the potential for a conflict of jurisdiction arises. The drafters of the accession agreement were aware of this and found the following solution in Article 5 AA-ECHR:

[quotation]Proceedings before the Court of Justice of the European Union shall be understood as constituting neither procedures of international investigation or settlement within the meaning of Article 35, paragraph 2.b, of the Convention, *nor means of dispute settlement within the meaning of Article 55 of the Convention.* (emphasis added)[/quotation]

By not regarding proceedings before the CJEU as a ‘means of dispute settlement’ the EU member states are not in violation of Article 55 ECHR if they submit a dispute between them alleging a violation of the ECHR to the CJEU. This way a conflict between Article 344 TFEU and Article 55 ECHR is avoided.

For a member state wishing to take another member state to court over a violation of the ECHR, this means that it may first have to bring such proceedings to the CJEU. However, it would be problematic to argue that all such cases fall within the jurisdiction of the CJEU. After all it is conceivable that a dispute relates to an entirely domestic matter that has no connection to EU law whatsoever. Given that Article 6(2) TEU stipulates that ‘accession shall not affect the competences of the Union as defined in the Treaties’ it cannot be assumed that the CJEU is to gain jurisdiction over alleged violations that have nothing to do with a member state’s EU obligations. Thus in inter-party cases there would be the additional difficulty of delimiting the CJEU’s jurisdiction in borderline scenarios. Such borderline cases would be difficult to decide as they would

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<sup>50</sup> Case 181/73 *Haegeman v Belgium* [1974] ECR 449.

<sup>51</sup> Case C-459/03 *Commission v Ireland – Mox Plant* [2006] ECR I-4635.

require a delimitation of competences between the EU and its member states. Since the CJEU has exclusive jurisdiction over such questions, the solution found in the accession agreement has a useful side-effect: given that proceedings under Article 259 TFEU are not considered to clash with the exclusive jurisdiction of the ECtHR under Article 55 ECHR, the CJEU can make this assessment without restrictions. Considering that a member state that brings proceedings before an international court in contravention of Article 344 TFEU violates the Treaties,<sup>52</sup> it is advisable that member states submit all borderline cases to the CJEU first. If the CJEU declines jurisdiction, the door is open to the ECtHR.<sup>53</sup>

The preceding discussion has revolved around cases between EU member states and has left untouched the role of the EU as a party to inter-party cases. There is no doubt that the EU would be able to become a party to such cases after accession.<sup>54</sup> Two questions arise in this context: first, whether the EU can bring inter-party cases against its own member states; second, whether the EU can bring such cases against non-member states.

As regards the first question it is suggested that the same considerations apply as those concerning inter-party cases between EU member states. According to Article 258 TFEU, the CJEU has jurisdiction over cases brought by the European Commission for alleged violations of their EU law obligations. As shown above, the ECHR would become an integral part of EU law so that after accession the member states are bound to comply with the ECHR by virtue of EU law as well so that Article 258 TFEU can be used to pursue such violations. However, Article 344 TFEU does not explicitly cover disputes between the EU and its member states before international courts. It is suggested that its rationale applies nonetheless as the interest of the Union with regard to the exclusivity of the CJEU's jurisdiction is the same: to ensure a uniform interpretation of EU law. The main reason why Article 344 TFEU is limited to disputes between member states is that at the time when it was drafted it was hardly conceivable that the (then) European Economic Community would become a party to international agreements providing for third party dispute settlement. It thus makes sense to consider the exclusive jurisdiction of the CJEU to extend to Article 258 TFEU. It follows that the EU is barred from bringing cases against its own member states before the ECtHR.

By contrast, when it comes to potential cases brought by the EU against non-member states, an argument based on the exclusive jurisdiction of the CJEU is bound to fail given that the CJEU does not enjoy jurisdiction over cases involving non-member states. However, as already mentioned, the accession agreement must not give new competences to the EU. The EU therefore cannot be deemed to have the competence to bring cases against other parties to the ECHR in all matters as it lacks a general human rights competence.<sup>55</sup> Thus the Union's ability to bring cases against non-member states depends upon whether the Union has the external competence to do so. This will need to be assessed in each individual case.<sup>56</sup>

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<sup>52</sup> Ibid.

<sup>53</sup> Given that after accession the ECHR will have to be qualified as a mixed agreement under EU law, additional difficulties arise, cf. Tobias Lock, 'The ECJ and the ECtHR: The future relationship between the two European Courts' (2009) 8 *Law and Practice of International Courts and Tribunals* 375, 390–1.

<sup>54</sup> Cf. Explanatory Report to the Accession Agreement, 47+1(2013)008rev2, para 70.

<sup>55</sup> This is implicit in the Court's reasoning in *Opinion 2/94*.

<sup>56</sup> An argument for a broad assessment is made by Paul Gragl, 'A reminiscence of Westphalia: inter-party cases after the EU's accession to the ECHR and the EU's potential as a human rights litigator' in Kanstantsin Dzehtsiarou et al (eds), *Human Rights Law in Europe* (Abingdon: Routledge 2014), 50–53.

## [b]7.2 The Problems Identified in *Opinion 2/13*

In *Opinion 2/13* the Court considered the solution found in Article 5 AA-ECHR to be insufficient to safeguard its exclusive jurisdiction. This is because the provision does not explicitly exclude the ECtHR's jurisdiction over such cases. It follows that once the CJEU has handed down a decision, the member states would still be free to then submit the dispute to the ECtHR.<sup>57</sup> The Court considered the very existence of this possibility to undermine the requirement set out in Article 344 TFEU.<sup>58</sup> Only an express exclusion of the ECtHR's jurisdiction would be compatible with the CJEU's exclusive jurisdiction. This, again, constitutes a very strict reading of Article 344 TFEU. While one cannot deny that subsequent proceedings before the ECtHR would be contrary to Article 344 TFEU given that the dispute would continue to be a dispute over an integral part of EU law,<sup>59</sup> the CJEU's reaction seems exaggerated. In the eyes of this author, an express exclusion in the accession agreement is unnecessary given that the legal situation for the member states and the Union is very clear: they must not bring such a case to the ECtHR. If they do so, they act in violation of the Treaties.<sup>60</sup>

## [a]8. CONCLUSION: A PEEK INTO THE FUTURE

It was the aim of this chapter to explore the position of the EU before the ECtHR after accession. Most of the intricate legal issues stem from the fact that after accession both the EU and its member states would be parties to the Convention. This necessitated the rules on the attribution of conduct and on (co-)responsibility. As has been shown, the CJEU did not consider the accession agreement to be compatible with the Treaties. Hence further changes would be necessary if the EU were to continue in its ambition to sign up to the ECHR. There are essentially two options for achieving this: either a re-negotiation of the accession agreement; or Treaty change in order to remove the hurdles identified by the CJEU. Neither option will be easy to achieve.

Should accession become a reality, the question will be whether it would lead to a new dynamic in the relationship between the two European courts. So far this relationship was one of equal co-existence as no formal links between the two courts were in place.<sup>61</sup> This is likely to change with accession, and it is suggested that the strict stance of the CJEU in *Opinion 2/13* was perhaps motivated by a degree of apprehension regarding such a change. The ECtHR would be put in a position in which it would have to exercise a review of EU activities. The requirement to exhaust domestic remedies in cases brought directly against the EU and the prior involvement procedure envisaged for cases in which the EU is co-respondent, make it almost certain that in such cases the CJEU would have had a say on the matter before the ECtHR decides. Where the ECtHR concludes that the EU has violated the Convention, this would therefore normally imply a finding that the fundamental rights protection provided by the CJEU was deficient. This shows that EU accession to the ECHR can be regarded to imply a transformation of

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<sup>57</sup> This had already been argued by Gragl, *ibid* 35, 42, even though he did not seem to see this as problematic.

<sup>58</sup> *Opinion 2/13* (n 3) para 208.

<sup>59</sup> On Article 344 TFEU more generally cf. Tobias Lock, *The European Court of Justice and International Courts*, OUP 2015, Chapter 3. .

<sup>60</sup> See Case C-459/03 *Commission v Ireland* [2006] ECR I-4635.

<sup>61</sup> On the relationship before accession cf. S Douglas-Scott, 'A tale of two courts: Luxembourg, Strasbourg and the growing European human rights acquis' (2006) 43 *Common Market Law Review* 629.



the relationship between the two courts from one of co-existence to one of subordination. This may sound threatening to the CJEU. However, one should bear in mind that this development is mitigated by the fact that the ECtHR's review is subsidiary, so that the first responsibility for the protection of fundamental rights in the EU would remain with the CJEU. Furthermore, it merely places the CJEU in the same position as the supreme courts of the member states, whose decisions are subject to the same scrutiny. However, this would merely be a consequence of the fact that the EU is placed on an equal footing with the other parties to the ECHR, which is confirmation of 'its particularity and maturity as an integration organization'.<sup>62</sup>

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<sup>62</sup> Gragl, *The Accession of the European Union to the European Convention on Human Rights* (n 21) 278; note, however, that in *Opinion 2/13* the CJEU was adamant that the EU was not a state and should therefore be treated differently, *Opinion 2/13* (n 3) para 156.